UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No.: 88-1886-CIV-MORENO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, et. al.,

Defendants.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT'S REPLY TO RESPONSES IN OPPOSITION [D.E. Nos. 2483, 2486, 2488] TO MOTION TO VACATE [D.E. 2459]

Introduction

Independent of the 1991 Consent Decree ("Decree"), substantive and procedural protections ensure that Everglades National Park ("Park") and the Arthur R. Marshall National Wildlife Refuge ("Refuge") will receive clean water. Credit the Decree for establishing a legal framework protective of the Park and Refuge while the State developed its comprehensive restoration program for all the Everglades. But today the Decree's value is no more than that of a security blanket.

Were the Decree merely unnecessary, the District's Motion to Vacate the Decree ("Motion") could seem pointlessly antagonistic to those desiring the Decree's comfort; an academic debate over principles of federalism. But here, the ivory tower is occupied by those unaccountable to the state officials they would so casually deprive of legislative and executive powers. Those who cling to the Decree do so without concern for urgent, highly-politicized state priorities—the embodiment of the public's interest.

The Decree's defects did not emerge overnight. The District's concern over conflict between the Decree and comprehensive Everglades restoration is longstanding.[1] In 2014, the District conditioned its support for the Central Everglades Planning Project ("CEPP," composed of Comprehensive Everglades Restoration Plan or "CERP" components) on modification of the Decree.[2] The U.S. Army Corps of Engineers ("USACE") agreed that redistribution of flows and delivery of additional water to the Park (i.e., restoration) under CEPP necessitated amendment of

[1] Obligations under the Decree and the goals of comprehensive Everglades restoration are frequently conflated in casual discourse. This Court previously untangled the two concepts, concluding that the original lawsuit and thus the Decree concerns only phosphorous discharges into the Park and Refuge. *U.S. v. S. Fla. Water Mgmt. Dist.*, No. 88-1886, 2011 U.S. Dist. LEXIS 113167, at *40–42 (S.D. Fla. Sept. 28, 2011).

[2] Attachment 1: Resolution No. 2014-0410.

the Decree's compliance methodology.[3] The District and USACE entrusted modification of the Decree to the Decree's Technical Oversight Committee ("TOC"). *Id.*

Five years later, the TOC has failed. The Decree remains as-is. The District has aired its frustration regarding the Decree's constraints on comprehensive Everglades restoration in many public forums, including two of the three meetings the TOC conducted in 2018. A District governing board member made a final, public appeal for the TOC to overcome its inertia weeks prior to seeking the Board's support to file the Motion.[4]

In contrast, the federal government rarely acknowledges the conflict between the Decree and comprehensive Everglades restoration publicly, for doing so exposes its choices to scrutiny. The United States' response in opposition to the Motion suggests scrutiny is warranted. In its response, federal officials choose the comfort of the Decree over the priorities of elected state officials. They choose to continue this Court's role as environmental regulator despite Florida Department of Environmental Protection ("FDEP") and U.S. Environmental Protection Agency ("USEPA") jurisdiction over comprehensive, alternative remedies that both protect the Park and Refuge and accommodate state-led restoration efforts.

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[3] Attachment 1; USACE CEPP Final Integrated Project Implementation Report and Environmental Impact Statement, July 2014 – Revised December 2014, available at: https://www.saj.usace.army.mil/Portals/44/docs/Environmental/CEPP/01_CEPP%20Final%20PIR-EIS%20Main%20Report.pdf

[4] The Conservation Interests and Audubon attempt to prejudice the District by making immaterial, impertinent, and scandalous suggestions of governing board impropriety associated with its public vote to file the Motion. The Conservation Interests and Audubon imply that one board member could not anticipate the actions of another unless they conferred outside of the "sunshine," in violation of Florida law. This nonsensical assertion ignores years of public commentary and exposes that the Conservation Interests and Audubon do not monitor TOC meetings. *See* February 27, 2018 and October 30, 2018 TOC Meeting Videos: http://sfwmd.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1863, http://sfwmd.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1927

For example, in August 2018, Florida's Governor directed the District to expedite construction of the S-333N structure (a component of CEPP) ahead of the federal government's schedule by four years.[5] The Governor's initiative responded to an urgent need to move clean water into the Park, which creates capacity upstream to receive additional water from Lake Okeechobee. Routing additional water south from the Lake allows the water to be cleaned in Stormwater Treatment Areas ("STAs") and reduces harmful water releases from the Lake to the Caloosahatchee and St. Lucie Estuaries. *Id.* Environmental organizations praised the State's decision and criticized the federal bureaucracy that otherwise would delay benefits of the project. *Id.* But under the framework of the Decree, the S-333N structure cannot legally operate at its capacity.[6]

Confronted with this conflict between the Decree and the Governor's initiative, the federal government dismisses the public's interest in favor of abundantly protecting its own. First, the United States retorts that completing CEPP projects on the federal government's schedule—not the state's expedited schedule—would eliminate conflicts with the Decree.[7] The federal government finds no concern with the conflict or the practical harm caused to Florida's coastal communities because it "stem[s] from a unilateral decision by the District" to change the S-333N construction schedule and thus "the District bears responsibility for this state of affairs." *Id.* at 18-19. Here, the United States directly contradicts USACE's prior recognition of conflict between the Decree and CEPP, under any construction schedule. *Supra* pp. 1–2.

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[5] Attachment 2: Gov. Scott: *Expedited Water Project Will Help Reduce Harmful Lake Okeechobee Discharges*, News Release, August 3, 2018.

[6] D.E. 2459 will be cited as Motion at p. ___; Motion at pp. 9–10.

[7] D.E. 2486 will be cited as USA Response at p.___; D.E. 2488 will be cited as Cons. Response at p.___; D.E. 2483 will be cited as Tribe Response at p.___; D.E. 2480 will be cited as FDEP Response at p. ___; USA Response at p. 15.

Second, the United States directs the District to the TOC for it to resolve the conflict between the Decree and Governor's initiative, conveniently ignoring the TOC's failure to reconcile CEPP with the Decree during the prior five years.[8] Here, the federal government values bureaucracy over the State's urgency in completing restoration projects to provide relief to its ailing communities. Finally, the federal government reveals its patronizing position in characterizing the District's inability to fully operate the S-333N project under the framework of the Decree as "at most an inconvenience," *Id.*, which grossly trivializes damage caused to the Caloosahatchee and St. Lucie Estuaries by water that could otherwise be routed south, cleaned, and provided to the Everglades for its restoration.

The federal government's disregard for the public's interest in expediting the S-333N component of CEPP indicates that it is poised to put the Decree between its already secure interest in the Park and Governor Desantis's initiative to expedite the Everglades Agricultural Area ("EAA") Reservoir. The United States' Response hints at the same.[9] The similarities between the State's S-333N and EAA Reservoir initiatives are many. Both are components of CEPP that will send additional, clean water south into the Park.[10] Both serve the dual purpose of providing restoration flows to the Everglades and reducing damaging discharges to Florida's coasts. *Id.* Environmental benefits to the coastal estuaries particularly motivate the State's desire to expedite both projects. *See id.* Expediting both projects enjoys tremendous support from environmental advocates and elected state officials.[11] Elected state officials are committing millions of dollars of

[8] *Id.* at 19.
[9] USA Response at pp. 11–12.
[10] Attachment 3: Executive Order 19-12; § 373.4598, Fla. Stat.
[11] Attachment 2; Attachment 4: Bruce Ritchie, *Negron's Revised Everglades Proposal Passes Final Committee Stop as Opposition Fades,* POLITICO (Apr. 5, 2017, 6:41 PM), https://www.politico.com.

state funds to expedite both projects.[12] Expediting both projects reflects a "unilateral" decision by the State to override the federal government's restoration schedule.[13]

In sum, the federal government would allow the Decree and its bureaucracy to deprive the State of the benefits of important state-led comprehensive Everglades restoration projects. The federal government cannot see the forest for the trees. Because alternative protections exist for the Park and Refuge, the District advances its Motion with this Court.

Argument

Federal Rule of Civil Procedure 60(b) permits relief from consent decrees. The U.S. Supreme Court requires flexibility when evaluating whether to vacate a consent decree under Rule 60(b)(5).[14] The United States is correct that a "critical question" is whether the objective of the Decree has been achieved.[15] In fact, this Court must begin its inquiry by determining the Decree's objective and, then, whether it has been achieved.[16] If the objective has been served, and durable remedies are in place, continued judicial oversight is "unnecessary and improper."[17]

I. Achieving the Decree's objective does not require each obligation be satisfied.

[12] Attachment 2; Attachment 3.
[13] The public debate whether to advance the EAA Reservoir relative to the federal schedule was particularly significant and determined by the state Legislature to be in the public's interest. *See* Attachment 4; *See also* § 373.4598, Fla. Stat.
[14] *Horne v. Flores*, 557 U.S. 433, 451–455 (2009); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 379–384 (1992); *Frew v. Hawkins*, 540 U.S. 431, 441 (2004).
[15] USA Response at p. 6; *Horne*, 557 U.S. 433 at 450, 454; *Jackson v. Los Lunas Cmty. Program*, 880 F.3d 1176, 1201 (10th Cir. 2018).
[16] *United States v. Miami*, 2 F.3d 1497, 1504–1505, 1508 (11th Cir. 1993); *Horne*, 557 U.S. 433 at 434, 435, 450, 454; *see also Johnson v. Florida*, 348 F.3d 1334, 1341 (11th Cir. 2003).
[17] *Horne*, 557 U.S. 433 at 434, 435, 450.

The Responses argue the District must satisfy each Decree obligation to meet its objective.[18] In reality, the Decree's objective can be met in other ways.[19] In this regard, *Horne* controls. As noted by scholars, *Horne* is the latest ruling in a trend of decisions that further relax the already flexible standard for vacating long-lasting institutional reform decrees.[20] This Decree is, indeed, institutional reform.[21] The judgment at issue in *Horne* required certain incremental funding for the State's educational program. *Id.* at 438–442. In reviewing denial of the State's motion, the *Horne* Court found that the 60(b)(5) inquiry was too narrow because it focused almost exclusively on the sufficiency of incremental funding, ignoring the many other state-implemented reform measures. *Id.* at 459–467. The United States asks this Court to make the same mistake. It urges exclusive focus on 100% compliance with the Decree's appendices, ignoring the State's efforts outside the confines of the Decree.[22] But the Decree's obligations are merely a mechanism to meet its broader objective; they are the means, not the end.[23] The United States erroneously conflates total satisfaction with meeting the Decree's objective, but satisfaction of the Decree is one of three enumerated ways to obtain relief under Rule 60(b)(5).[24]

a. The true objective of the Decree is to provide a framework for compliance with State water quality standards.

To determine whether the Decree's objective has been met, this Court must recognize its objective. Because the Decree has perilously taken on a life beyond its narrow confines, the parties

[18] USA Response at pp. 7–14; Cons. Response at pp. 4, 10; Tribe Response at pp. 1, 10–13; *Horne,* 557 U.S. 433 at 450.
[19] *Horne*, 557 U.S. 433 at 451–455.
[20] *Jackson,* 880 F.3d 1176 at 1199 (citing secondary academic sources).
[21] *See Horne*, 557 U.S. 433 at 447.
[22] USA Response at pp. 7–9.
[23] *See Horne*, 557 U.S. 433 at 493.
[24] Fed. R. of Civ. P. 60(b)(5); *Horne*, 557 U.S. 433 at 433 ("[u]se of the disjunctive "or" makes it clear that each of [Rule 60(b)(5)'s] three grounds for relief is independently sufficient and therefore that relief may be warranted even if petitioners have not satisfied the original order.")

vary widely in characterizing its objective.[25] These contradictions highlight one of the many dangers of long-standing consent decrees.[26]

Fortunately, this Court already decided, and the Eleventh Circuit agreed, that the purpose of the Decree is to provide a process for compliance with State law, specifically, water quality standards.[27] The Decree has done that. In the last 27 years, the State not only created a USEPA and court-approved numeric phosphorus criterion for the Everglades, but it also obtained a federal National Pollutant Discharge Elimination System ("NPDES") permit with a protective Water Quality Based Effluent Limit ("WQBEL") for the STAs that discharge into the Park and Refuge, and mandated a suite of restoration projects dubbed Restoration Strategies.[28] Thus, the State implemented improved water quality standards and an improved framework for compliance—the objective of the Decree is achieved.

b. The State's Phosphorus Rule and Everglades Forever Act are science-based protections for the entire Everglades.

At the time it was negotiated, the parties to the Decree agreed that Florida needed a numeric water quality standard to protect the Everglades.[29] From 1994 to 2000, Florida led an intensive research program that supported the State's Phosphorus Rule created under the Everglades Forever

[25] USA Response at pp. 1–2, 7–9; Cons. Response at pp. 1–2, 6, 9; Tribe Response at pp. 3, 10.
[26] *See Jackson*, 880 F.3d 1176 at 1200 (court is in the best position to assess whether the litigation has taken on a life of its own and now advances a tenuous purpose); *Horne*, 557 U.S. 433 at 434, 448, 453; *Frew*, 540 U.S. 431 at 441.
[27] *United States v. S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1570 (11th Cir. 1994) ("The essence of the Agreement [Decree] is to achieve compliance with State law" and ". . . [the Decree's] object was to require adherence to state law."); *Miccosukee Tribe of Indians of Fla. v. United States*, 2008 U.S. Dist. LEXIS 57809, at *33 (S.D. Fla. July 29, 2008); *See* D.E. *United States' Second Amended Complaint*, p. 10–14 (Count I: SFWMD and DER Violated State Law, Count II: SFWMD has Violated State Law).
[28] See Attachment 5: June 13, 2012 USEPA Letter Re: *Assessment of the State of Florida's Everglades Water Quality Plan*; Motion at pp. 11–14.
[29] Decree at pp. 15–16, ¶ 11.A.1, Appendix D.

Act ("EFA"). USEPA highlighted this unique initiative in their evaluation of the Phosphorus Rule.[30]

Florida's scientific research supports a long term geometric mean of 10 ppb limit on phosphorus throughout the Everglades marsh to prevent an imbalance of flora and fauna.[31] The Phosphorus Rule uses a 4-part test to account for natural variations unlike the rigid equation in the Decree's Appendix A, which contains no such mechanism.

The EFA also codifies the State's widely-celebrated Restoration Strategies program.[32] Restoration Strategies improves water quality for the entire Everglades. FDEP ensures that this $880 million suite of restoration projects is timely completed through a consent order.[33]

c. The State's NPDES permit ensures the STAs only discharge clean water.

The Decree obligated the District to build STAs to store and treat phosphorus-laden runoff from the EAA.[34] The District constructed double the STA acreage required by the Decree and worked closely with FDEP and USEPA to create a WQBEL that limits phosphorus concentrations in STA discharges to 13 ppb. The USEPA and the Southern District approved the WQBEL as protective of the entire Everglades, and it withstood a state administrative rule challenge.[35] The WQBEL is enforced through the NPDES permit issued by FDEP and overseen by USEPA.[36] The

[30] D.E. 2460-14, FN-2968-2990. "[t]he Everglades has been the subject of intense scientific study. No other wetland system and few other bodies of water in the world have as much scientific information regarding phosphorus conditions and the ecological impacts of phosphorus enrichment."
[31] Fla. Admin. Code r. 62-302.540.
[32] *See* § 373.4592(3), Fla. Stat., (Everglades Long-Term Plan) and § 373.4592(2)(j) (Defining the Long-Term Plan to include Restoration Strategies).
[33] D.E. 2460-04, FN-1311-1331.
[34] Decree at Appendix C.
[35] Attachment 5; Motion at pp. 13–14
[36] D.E. 2460-16.

District must renew its permit every five years and each renewal is subject to challenge.[37] Any compliance issues will bring enforcement actions from FDEP, USEPA, and Florida's citizens and environmental organizations through enforcement processes afforded under state and federal law.[38]

II. The State maintains durable remedies: its compliance is not short-lived.

This Court is assured that the State's progress and compliance is not fleeting. Durable remedies are in place to ensure continued water quality compliance and improvement through the State's EFA, Phosphorus Rule, Restoration Strategies, and NPDES permits.

State law codifies 10 ppb as the phosphorus concentration limit for the Refuge today, and the Park when the Decree is vacated.[39] The opposing parties claim the Phosphorus Rule is not a durable remedy by asserting that 10 ppb is not as protective as 8 ppb.[40] But this claim is unsupported. Moreover, the degree of protection is irrelevant because the USEPA already approved 10 ppb as protective of the Park, and the Rule has withstood administrative and federal challenges.[41] The parties cannot relitigate these issues here. However, the State must initiate public rulemaking procedures to establish monitoring stations when the Decree terminates, providing opportunity for public participation and litigation if necessary.[42]

The federal parties also claim that Restoration Strategies is not a true durable remedy until the projects are complete and operating for years.[43] Restoration Strategies is a product of a legal

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[37] D.E. 2460-16, FN-2995, 3009 (permit [e]ffective September 10, 2017 – September 9, 2022; duty to apply for renewal); *See* sections 120.569, 120.57, Fla. Stat.
[38] *See* §§ 120.69, 403.412, Fla. Stat.; *See* 33 U.S.C. § 1319(1), 33 U.S.C. § 1365.
[39] Fla. Admin. Code r. 62-302.540(4)(c) and (d).
[40] USA Response at p. 10, Cons. Response at p. 12.
[41] D.E. 2460-14, FN-2968-90; *Miccosukee Tribe of Indians*, 2008 U.S. Dist. LEXIS 57809; *Miccosukee Tribe of Indians*, 2004 Fla. Env. LEXIS 211.
[42] *See* §§ 373.418, 120.536, 120.54, 120.545, 120.55, 120.56, Fla. Stat.
[43] USA Response at pp. 4, 12.

settlement between the USEPA and the State, enforceable through permits, consent orders, and mandated in Florida law.[44] It is not a "wait and see" commitment. The Decree does not provide the United States an opportunity to reopen that settlement with the State.

Further, the United States incorrectly argues the NPDES permit is not a durable remedy because of "regulatory uncertainties" meeting the WQBEL.[45] Research does not support this pure speculation, and USEPA prescribed Restoration Strategies to meet the WQBEL.[46]

Importantly, the State's remedies are durable because administrative processes allow for enforcement action should the State fall behind.[47] The Decree's objective is achieved, and compliance will not be fleeting. Thus, continued judicial oversight at the expense of state priorities, the public's interest, comprehensive Everglades restoration, and federalism is unnecessary and improper.[48]

Conclusion

The District's Motion focuses this Court on the Decree's inequities, but should this Court desire an evidentiary hearing, the District reserves the right to additionally prove that the Decree is, in fact, satisfied. Nonetheless, the District urges this Court to decide, as a matter of law, that the Decree's objective is achieved, durable remedies are in place, and federalism and the public's interest in comprehensive Everglades restoration require vacatur.

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[44] Attachment 6: EFA Permit No. 0311207 (September 10, 2012); Attachment 7: EFA Consent Order, OGC File No. 12-1149 (August 15, 2012); Attachment 5: June 13, 2012 USEPA Letter; § 373.4592, Fla. Stat.
[45] USA Response at pp. 4, 9–12.
[46] *See* Attachment 5: June 13, 2012 USEPA Letter.
[47] *See* §§ 403.412, 120.69, Fla. Stat.; *See* 33 U.S.C. § 1319(1), 33 U.S.C. § 1365.
[48] *See Horne*, 557 U.S. at 434, 435, 450.

Respectfully submitted this 30th day of January 2019.

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Certificate of Service

I HEREBY CERTIFY that on January 30, 2019, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served upon counsel of record by transmission of Notices of Electronic Filing generated by the Court's CM/ECF system.

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